Neutral Citation Number: [2022] EWHC 646 (Admin)

Case No: CO/264/2021

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
SITTING IN LEEDS

Friday 18th March 2022

Before:
MR JUSTICE FORDHAM

- -

Between:

THE QUEEN (on the application of RAZA ALI)	**Claimant**
- and -	
POLICE APPEALS TRIBUNAL	**Defendant**
-and-	
CHIEF CONSTABLE OF NORTH YORKSHIRE POLICE	**Interested Party**

- -
- -

Alisdair Williamson QC and **Christopher Hopkins** (instructed by Haighs Law)
for the **Claimant**
The **Defendant** did not appear and was not represented
John Beggs QC and **Oliver Williamson (**instructed by North Yorkshire Police Service)
for the **Interested Party**

- -

Hearing date: 9.3.22

- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This is a case about a student police officer, the timing of a Regulation 15 Notice and the 'informal fact-finding' which preceded that Notice. It came before the Court as an in-person substantive hearing of a judicial review claim commenced by the Claimant on 2 August 2021, brought with the permission of HHJ Gosnell granted on the papers. The claim impugns, as its target, the determination ("the Chair's Determination") by a Chair of the Police Appeals Tribunal. The Chair's Determination was issued pursuant to Rule 11(5) of the Police Appeals Tribunal's Rules 2012 ("the Rules"), dismissing an appeal pursuant to Rule 4. The Claimant's appeal was against a decision on 13 November 2020 that he be dismissed from the North Yorkshire Police Service ("NYPS") without notice. That decision ("the Panel Decision") had been taken by a three-member Panel after a 5-day misconduct hearing held between 9 and 13 November 2020.

2. During the course of the misconduct hearing, the Panel determined as a preliminary issue ("the Panel Determination") an application by the Claimant to dismiss one allegation against him ("Allegation 4"). The basis of the application was that there had been an:

> ***… alleged regulatory departure causing irredeemable prejudice such that a fair hearing cannot take place***

The "alleged regulatory departure" relied on was the failure to serve a notice ("a Regulation 15 Notice") in accordance with Regulation 15(1) of the Police (Conduct) Regulations 2012 ("the Regulations"), before conducting a meeting with the Claimant on 12 December 2018 ("the Meeting"). The Panel Determination rejected the application. It is that rejection which is at the heart of this judicial review claim. The parties in the proceedings dealt with by the Panel, and then the Chair, were the Claimant and the Interested Party. The Tribunal, as Defendant to these judicial review proceedings, has properly adopted a neutral position.

Law

3. The Rules and the Regulations to which I am referring in this judgment are of those which, everyone agrees, were applicable at the relevant time and remain applicable to this case. Rule 11(5) provides for an appeal to be dismissed "if the Chair considers that (a) the appeal has no real prospect of success; and (b) there is no other compelling reason why the appeal should proceed". Rule 4(4) (read with Rule 4(1)) provides for an appeal, whose "grounds of appeal" may be "(a) that [a] finding [made under the Regulations] or disciplinary action imposed [under the Regulations in consequence of that finding]; or … (c) that there was a breach of the procedures set out in the … Regulations …, or other unfairness which could have materially affected the finding or decision on disciplinary action". The test "regulatory departure causing irredeemable prejudice such that a fair hearing cannot take place" was agreed between the parties, and remained common ground before me, as the legally correct test for the Panel to have applied. It had been derived from cases which include R v Merseyside Chief Constable, ex p Merrill [1989] 1 WLR 1077 (see 1085F-G); R (Redgrave) v Metropolitan Police Commissioner [2002] EWHC 1074 (Admin) (see §40); and R

(Wilkinson) v West Yorkshire Chief Constable [2002] EWHC 2353 (Admin) (see §§25 and 56). It was – and is – also agreed between the parties that in applying that legally correct test there were two legally correct questions to be determined as:

> ***Question (a): Has there been a departure from the requirements of the Regulations?***
>
> ***Question (b): If yes, did irredeemable prejudice arise as a result, so that continuation of Allegation 4 is unfair?***

4. The parties were – and are – agreed that if the Panel answered Question (a) "no" – as it did – that was the end of the matter. It is also common ground, before me, that the appeal against that answer – and so the appeal against the Panel Determination - engaged Rule 4(4)(c) ("a breach of the procedures set out in the Regulations… which could have materially affected the finding or decision on disciplinary action"). That means it would not be necessary for the Claimant to surmount the 'objective unreasonableness' threshold (discussed in R (Wiltshire Chief Constable) v Police Appeals Tribunal [2012] EWHC 3288 (Admin) at §§32-34). The parties agree that I must apply conventional public law standards – including 'public law unreasonableness' – in the discharge of this Court's supervisory jurisdiction of judicial review in relation to the Chair's Determination (as illustrated by R (Wilby-Newton) v Police Appeals Tribunal [2021] EWHC 550 (Admin) at §§83-87, 102, 123, 125). Finally, there was also agreement that none of the decided cases involved any consideration or analysis which could assist in the present case regarding informal steps taken prior to the issuing of a Regulation 15 Notice.

Context

5. The Claimant joined NYPS on 18 July 2018. Like all student officers, he was enrolled on the Initial Police Learning and Development Programme ("the Programme"). On 25 July 2018 he attended an induction delivered by Caroline Stanley, the Programme's Lead Internal Quality Assurer ("IQA"). NYPS required student officers to successfully complete a City and Guilds ("C&G") Level 3 Diploma in Policing, in order for their NYPS appointment to be confirmed. The Standards of Professional Behaviour ("SPB") in Schedule 2 to the Regulations were applicable to student officers from the time of their joining NYPS. Breach of the SPB is "misconduct"; and breach of the SPB so serious that dismissal would be justified is "gross misconduct": see Regulation 3(1). The first of the SPB is "honesty and integrity: police officers are honest, act with integrity and do not compromise or abuse their position". An equivalent standard was discussed, in an operational context, in R (Salter) v Dorset Chief Constable [2012] EWCA Civ 1047. Ms Stanley's role as Lead IQA was to 'assure the quality' of the Programme for the purposes of C&G and C&G's applicable policies and standards. Those policies included C&G's requirements and guidance entitled "Managing cases of suspected malpractice in examinations and assessments". Included within the Programme was the task of completing a Student Officer and Learning Assessment Portfolio of evidence ("the Portfolio"), successful completion of which would result in award of the Diploma. The Portfolio included the student officer uploading coursework evidence to a C&G website, through an NYPS intranet portal. On 24 September 2018, 4 October 2018, 29 October 2018 and 7 November 2018 ("the 4 Dates") the Claimant submitted Portfolio work in relation to parts of the Programme: Units 404, 317, 313 and 401 respectively ("the 4 Units").

6. Catherine Convey-Brown is a trainer working for NYPS. She conducted a routine assessment on 21 November 2018 for Unit 404 and identified similarities between the work uploaded by the Claimant and by a fellow student officer on the same cohort (PC Laura Hayley). Ms Convery-Brown was concerned that both submissions were extremely similar. She asked Ms Stanley to have a look at the materials, telling Ms Stanley that she was concerned and wanted to flag it up to someone. Ms Stanley reviewed the position. This was not the first time that a question concerning circumstances involving student officers copying each other's work had arisen. Ms Stanley and her colleague Rachel Wood had spoken about that subject, on 19 September 2018, with DI Coward in his role of the Detective Inspector in Professional Standards within NYPS's Professional Standards Department ("PSD"). That conversation on 19 September 2018 had led DI Coward to send an email, later that day, to the Head of Training, Louise Dunwell. Ms Stanley's review of the matter to which Ms Convery-Brown had alerted her concerning the Claimant and PC Hayley led to Ms Stanley completing a "Suspected Learner Malpractice Notification Form" dated 29 November 2018, which she submitted to C&G, in accordance with C&G's policies and procedures. At an unknown date prior to 7 December 2018, a conversation took place between Ms Stanley and DI Coward. Ms Stanley convened meetings with each of the student officers – PC Hayley and the Claimant – to be attended by those officers who were their supervisors: in PC Hayley's case PS Hauxwell; in the Claimant's case PS Rawet. Ms Stanley sent an "Outlook Invitation" by email to PS Rawet. The meeting conducted by Ms Stanley with PC Hayley (and PS Hauxwell) took place on 7 December 2018. The Meeting, conducted by Ms Stanley with the Claimant (and PS Rawet), took place on 12 December 2018. Following the meetings, Ms Stanley wrote a memorandum which was submitted to C&G. PSD was updated. An assessment was carried out by DCI Taylor (acting as the delegate to the "Appropriate Authority" (Regulation 5(1), Regulation 12(1)); a decision that the matter should be "investigated" was made (Regulation 12(3)(4)); a "person to investigate the matter" was appointed (Stephanie Ingham) (Regulation 13(2)); and Regulation 15 Notices were issued (19 March 2019) against the Claimant and PC Hayley (Regulation 15(1)), to which they each responded. In due course it was concluded that there was no case to answer against PC Hayley. Misconduct proceedings ensued against the Claimant.

7. Paragraphs 1 to 3 (read with paragraph 5) of the allegation against the Claimant were, in substance, this. He had made a "learner declaration" confirming that all evidence presented by him would be his own work. After doing so, he had deliberately and knowingly submitted the work of another student officer which he had copied. He had copied and submitted the work of that other officer within his own portfolio of evidence. He did so in circumstances when he knew or ought to have known that he was not allowed to do that, that he was required to submit only his own work, that it was not acceptable to copy the work of another student, and that any form of collaborative learning did not permit the submission of another student's work as his own work. He submitted material, substantial parts of which were copied from documents which had been sent to him by PC Hayley, specifically on the 4 Dates and for the 4 Units. This conduct was misleading and dishonest and breached the SPB, amounting to gross misconduct.

8. Allegation 4 (paragraph 4, read with paragraph 5) against the Claimant related to the Meeting. What was alleged against him was this. He had attended a meeting with PS Rawat and Lead IQA Ms Stanley of NYPS. During the Meeting: (a) he stated that all

the work he had submitted was his own; (b) he stated that he did not understand how highlighted areas of his work were identical to another student officer; and (c) he stated that he could not remember whether he had given work to, and/or received work from, anyone else. That conduct was misleading and dishonest and breached the SPB, amounting to gross misconduct. As I have explained, it was this aspect of the case – Allegation 4 – which was the subject of the Panel Determination.

Regulation 15

9. The Regulatory setting for a Regulation 15 Notice – as is seen in action by what happened in this case, but only after the Meeting – is as follows. The relevant Regulations apply only to cases not dealt with by other investigatory procedures (Regulation 11). They "apply where an allegation comes to the attention of an appropriate authority which indicates that the conduct of a police officer may amount to misconduct or gross misconduct" (Regulation 5(1)). The link between misconduct/gross misconduct and the SPB has been made above: Regulation 3(1). The "appropriate authority" is, so far as material to this case, the "chief officer of the police force concerned" (and their delegate) (Regulation 3(1)). Regulation 12 imposes an obligation on the appropriate authority to make an assessment (asking a "Contingent Question") of whether the conduct which is the subject matter of the allegation "would", "if proved", amount to misconduct or gross misconduct or neither (Regulation 12(1)). Different consequences flow from different answers to the Contingent Question as to what the subject-matter conduct would be, if proved. If it would be neither misconduct or gross misconduct, the appropriate authority is empowered to take no action, take management action or refer the matter to be dealt with under "performance" regulations (Regulation 12(2)). If it would amount to gross misconduct, the appropriate authority is obliged to conduct an investigation (Regulation 12(4)). If it would amount to misconduct but not gross misconduct, the appropriate authority is empowered to conduct an investigation and, in the alternative, may take no action or will take management action (Regulation 12(3)). Where a matter is to be investigated the appropriate authority is obliged (subject to immaterial exceptions) to appoint a person to investigate (Regulation 13(1)(2)). The purpose of the investigation is to gather evidence, to establish the facts and circumstances of the alleged misconduct or gross misconduct, and to assist the appropriate authority to establish whether there is a case to answer in respect of misconduct or gross misconduct or whether there is no case to answer (Regulation 14)).

10. It is in this regulatory setting that Regulation 15 – which is central to this claim for judicial review – provides as follows:

> ***15.— Written notices***
>
> ***(1) The investigator shall as soon as is reasonably practicable after being appointed, and subject to paragraph (3), cause the officer concerned to be given written notice— (a) describing the conduct that is the subject matter of the allegation and how that conduct is alleged to fall below the Standards of Professional Behaviour; (b) of the appropriate authority's assessment of whether that conduct, if proved, would amount to misconduct or gross misconduct; (c) that there is to be an investigation into the matter and the identity of the investigator; (d) of whether, if the matter were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing and the reason for this; (e) that if the likely form of any misconduct proceedings to be held changes, further notice (with reasons) will be given; (ea) that if he is dismissed at misconduct proceedings, his full name and a description of the conduct which led to his dismissal will be added to the***

> ***police barred list and may be subject to publication for a period of up to five years; (f) informing him that he has the right to seek advice from his staff association or any other body and of the effect of regulation 6(1) and (2); (g) of the effect of regulations 7(1) to (3) and 16; and (h) informing him that whilst he does not have to say anything it may harm his case if he does not mention when interviewed or when providing any information under regulations 16(1) or 22(2) or (3) something which he later relies on in any misconduct proceedings or special case hearing or at an appeal meeting or appeal hearing.***
>
> ***(2) If following service of the notice under paragraph (1), the appropriate authority revises its assessment of the conduct in accordance with regulation 12(5) or its determination of the likely form of any misconduct proceedings to be taken, the appropriate authority shall, as soon as practicable, give the officer concerned further written notice of – (a) the assessment of whether the conduct, if proved, would amount to misconduct or gross misconduct as the case may be and the reason for that assessment; and (b) whether, if the case were to be referred to misconduct proceedings, those would be likely to be a misconduct meeting or a misconduct hearing and the reason for this.***
>
> ***(3) The requirement to give a written notice to the officer concerned under paragraph (1) does not apply for so long as the investigator considers that giving such a notice might prejudice the investigation or any other investigation (including, in particular, a criminal investigation).***
>
> ***(4) Once a written notice has been given in accordance with paragraph (1), the investigator shall notify the officer concerned of the progress of the investigation – (a) if there has been no previous notification following the supply of the written notice under paragraph (1), before the end of 4 weeks beginning with the first working day after the start of the investigation; and (b) in any other case, before the end of 4 weeks beginning with the first working day after the previous notification.***

Guidance

11. In the Panel Determination the Panel set out paragraph 2.113 of the Home Office Guidance on Police Misconduct (June 2018). That is statutory guidance, issued by the Secretary of the State pursuant to section 87(1) of the Police Act 1996 as amended, for police authorities, as to the discharge of their functions including under the Regulations. Paragraph 2.113 sits within a series of paragraphs which include the following.

> ***Misconduct Procedures***
>
> ***Assessment of conduct – (Is the case one of misconduct?)***
>
> ***2.107. Where an allegation is made against the conduct of a police officer or special constable, being a matter that does not involve a complaint, a recordable conduct matter or a death or serious injury, the matter will be dealt with under the Conduct Regulations from the outset. However, … the appropriate authority must formally assess whether the conduct alleged, if proved, would amount to misconduct or gross misconduct.***
>
> ***…***
>
> ***2.112. If it is not possible to make an immediate assessment a process of fact finding should be conducted but only to the extent that it is necessary to determine which procedure should be used. It is perfectly acceptable to ask questions to seek to establish which police officers may have been involved in a particular incident and therefore to eliminate those police officers who are not involved.***
>
> ***2.113. A formal investigation into a particular police officer's conduct affords the police officer certain safeguards in the interests of fairness such as the service of a notice informing the police officer that his or her conduct is subject to investigation and notifying the police***

> ***officer of his or her right to consult with a police friend. The initial assessment and in particular fact finding should therefore not go so far as to undermine these safeguards.***
>
> ***2.114. Even if the person making the assessment has decided that the matter is not potentially one of misconduct he or she should consider whether there are any developmental or organisational issues which may need to be addressed by the individual (e.g. through management action) or the organisation.***
>
> ***…***
>
> ***Severity assessment – Is the matter potentially misconduct or gross misconduct?***
>
> ***…***
>
> ***2.124. An assessment as to whether an allegation should be investigated as misconduct or gross misconduct should be balanced and should take into account the seriousness of the allegation and the likely conclusions that could be reasonably drawn from all the evidence that can be foreseeably secured during the course of the investigation. The assessment should also consider foreseeable mitigating factors in the event that the conduct alleged is either admitted or found proven.***

The Panel Determination

12. The Panel Determination was a 60-paragraph, 13-page reasoned determination dealing with the application to dismiss Allegation 4 on the basis of "regulatory departure causing irredeemable prejudice such that a fair hearing cannot take place". The legally-qualified Panel chair had been invited by the Claimant to determine the application sitting alone, but had determined that, given that it engaged a mixture of law and fact, it ought to be determined by the fully-constituted Panel, as it was. For the purposes of determining the application, the Panel heard oral evidence, with cross-examination by Counsel on behalf of the Claimant (Mr Hopkins), from three witnesses: Ms Stanley; DI Coward; and PS Rawet. The Panel summarised the material factual, and the evidence elicited from each of those three witnesses. It then identified the two agreed questions falling to be determined. It recorded the parties' agreed position that a negative conclusion on Question (a) would be fatal, and their further agreed position that – since Question (b) engaged the Claimant's account of the facts and the potential for the need for evidence from him on that question – the Panel ought to determine Question (a) "in isolation first".

13. In determining Question (a) the Panel summarised the position of the parties and then gave a reasoned analysis by addressing each of the following three sub-questions:

> ***Sub-Question (1): Was a misconduct investigation in place before 12 December 2018?***
>
> ***Sub-Question (2): Was Ms Stanley conducting a de facto misconduct investigation?***
>
> ***Sub-Question (3): Should this have been a misconduct investigation?***

There is no challenge to these as being relevant questions which the Panel was entitled to adopt as being appropriate and sufficient to determine the application.

14. The Panel analysed all three Sub-Questions in turn and reached the answer "no" in relation to each of them. Having done so, the Panel concluded as follows: there was no misconduct investigation in relation to the Claimant on or before 12 December 2018; it was permissible for there to be no misconduct investigation in existence; absent a

misconduct investigation, the requirements of regulation 15 of the Regulations were not triggered. On that basis, the Panel concluded that the application was dismissed, and that Allegation 4 would proceed.

15. It is not necessary for the purposes of this judgment to quote lengthy passages from the Panel Determination. It is sufficient if I seek to encapsulate the essence of the Panel's evaluative analysis.

i) The Panel's summary of Ms Stanley's evidence included the following: Ms Stanley did not think the suspected malpractice with which she was concerned was misconduct; she did not think the Meeting she had convened with the Claimant was a disciplinary meeting; she had contacted DI Coward at PSD because she wanted to make sure she was doing the right thing; it was usual for a line manager (PS Hauxwell; PS Rawet) to be present for this type of conversation; the purpose of the meeting was to try to find out the facts, to find out if there was any explanation as to why the two pieces of work were similar, which was all Ms Stanley needed to find out at that time; Ms Stanley considered that there might have been an innocent explanation for the similarities, with the two officers legitimately working together; Ms Stanley's sphere was training and not professional standards; she did not have knowledge or experience of conducting misconduct investigations; the thought of doing so had not occurred to her; her primary concern was with ensuring that the issue was dealt with in a manner with which both C&G and PSD were happy; a process had been agreed within NYPS that any suspected plagiarism would be forwarded to PSD who would make its own determination; she was carrying out enquiries as required by the C&G process. The Panel described Ms Stanley as a straightforward and clear witness.

ii) The Panel's summary of DI Coward's evidence included the following: DI Coward had had a conversation with Ms Stanley about the C&G process; he had advised Ms Stanley that in his view she should establish the facts, and speak to the student officers, his view being that this was a "performance" matter that could be dealt with by way of "performance"; being familiar with the Guidance DI Coward was of the view that potential conduct matters could be dealt with by an appropriate authority assessor in the least serious way; he had thought that the incidents of copying in the present case had been a shared "theory" aspect of the students' work; he had not viewed the plagiarism as cheating and therefore a misconduct issue, albeit that he accepted that plagiarism might have an inherent aspect of cheating. The Panel described DI Coward as a credible witness.

iii) The Panel's summary of PS Rawet's evidence included the following: PS Rawet demonstrated an understanding of when the rigours of the Regulations will be required; he did not view the Meeting to be such an occasion; his evidence was that the Meeting was appropriate; his evidence was that calling officers into an office without notice to explain matters in this way was "fairly standard practice". The Panel described PS Rawet as a straightforward witness.

iv) On Sub-Question (1), the Panel concluded that a misconduct investigation was not in place on or before 12 December 2018. It accepted DI Coward's evidence that he had assessed the alleged plagiarism, on the evidence before him, as a

"performance" issue as opposed to "misconduct". This corresponded to a contemporaneous document: the email which he had sent on 19 September 2018 to Ms Dunwell. That email described the previously discussed circumstances involving student officers copying each other's work as "a performance issue", involving "taking shortcuts and not performing", rather than "deliberately intended to deceive the organisational accrediting body", albeit that if there arose "aggravating circumstances" such as if "they lie to you or go out of their way to cover up their action" then it would be "worth escalating the matter to PSD to review". The email referred to DI Coward being "open to contrary views". It was a contemporaneous record of the way that DI Coward was thinking. Its formulated and transparent nature was supported by the fact that he had sent it to Ms Dunwell, the Head of Training. It was credible that DI Coward understood the copying to be "within the theory section of the submitted work" and therefore involved "taking shortcuts, not lying". That evidence was accepted by the Panel. It involved a distinction between copying a "theory section" and copying "someone else's lived experience and presenting it as your own'. DI Coward had understood the alleged copying to be in the "theory" category and had formed his view on that basis. He had also understood the Guidance to require the appropriate authority and line managers to deal with matters "at the lowest level", which the Panel found to be consistent with the spirit of the Guidance and not an approach which it considered should be "discouraged".

v) On Sub-Question (2), the Panel concluded that Ms Stanley had not been conducting a "de facto misconduct investigation", whether "accidentally", or whether as part of a "deliberate attempt to conceal the true nature of her endeavour". The Panel accepted her clear and credible evidence which described the purpose of the Meeting as being "to find out if there was any explanation as to why the two pieces of work were similar" which was "all we needed to find out at the time". That evidence was, found the Panel, consistent with the report which Ms Stanley had then written up. Her explanation that these were "preliminary enquiries, to inform the C&G decision as to how to proceed" was consistent with her written-up report, describing enquiries to gather further information in accordance with the C&G policy and procedures. The "Outlook Invitation" which Ms Stanley had sent to PS Rawet was a contemporaneous document which recorded that Ms Stanley had decided to convene the Meeting and speak to the Claimant "in line with the C&G policy in relation to plagiarism". The questions which Ms Stanley had asked at the Meeting were questions "all required for the enquiry she told us she was conducting". DI Coward did not know exactly what questions would be asked and nor did he prescribe any questions to Ms Stanley. All of this was consistent with Ms Stanley making enquiries "for the purpose of the C&G process and not with a view to investigating suspected misconduct within the meaning of the [Regulations]". All of this was also consistent with PS Rawet's evidence that calling officers to explain themselves in this way was "not unusual", and that asking officers to account for certain matters without prior notice in the privacy of an office was "fairly standard practice". Additional evidential matters relied on by the Claimant had not persuaded the Panel that this was a de facto misconduct interview or something similar. These included the use of the word "investigation" or "interview", references to conducting a "quality audit", reference having made been made during the Meeting to the Code of Ethics, and

an argument based on the need during the Meeting to suspend the enquiry and instigate the rigours of the Regulations. Reference to the Code of Ethics was consistent with the line manager speaking to a subordinate about what had occurred, and the importance of the subordinate being truthful in answering. This remained an early stage of the enquiries, when it was not known whether the Claimant's factual assertions were accurate or otherwise. These circumstances supported the conclusion that there was no need to suspend the enquiry.

vi) On Sub-Question (3) the Panel found that, in the circumstances, a misconduct investigation was not a course which "should have been" instigated. The potential for innocent explanations remained live. Initial assessments and provisional assessments are appropriately made by an appropriate authority acting in accordance with the Regulations. There is a characterisation function, whereby an issue may be assessed "as a performance issue". PS Hauxwell's recorded unhappiness with the manner in which the meeting with PC Hayley had been conducted did not go to the central issue: the central issue concerned the nature of the suspected plagiarism on the facts known to the appropriate authority at the time, and whether it warranted the instigation of the Regulations; and the question was not whether PS Hauxwell agreed with the decision not to instigate the framework of the Regulations, but rather whether that decision was in accordance with the Regulations.

vii) For these reasons, the Panel dismissed the application. In doing so, the Panel went on to observe that the Claimant was still "perfectly entitled to advance many of the points ventilated within this application as part of his substantive effect". The Panel reasoned that whether the nature of the Meeting might have adversely affected the Claimant's ability to answer questions comprehensively was an evidential issue to which it would come in the substantive decision, but was not evidence of "regulatory departure". Indeed, in due course, when the Panel did in the Panel Decision come to consider the substantive merits on Allegation 4 it addressed the context in which the Claimant had made the statements which he did at the Meeting. That context included that the Claimant was "a new officer, uncomfortable in his surroundings and trying to make a good impression" who had been "called into a meeting in his Sergeant's office, for which he had received no prior notice" where another manager was present, where he did not really know either of them, and where he "felt like a rabbit in the headlights".

16. Since this judicial review challenge squarely concerns only the Panel Determination, refusing to dismiss Allegation 4 for "regulatory departure causing irredeemable prejudice such that a fair hearing cannot take place", and since in the Panel Determination the Panel answered "no" to Question (a), I do not consider it necessary for the purposes of the discharge of the Court's supervisory jurisdiction to say more about the Panel Decision.

The Chair's Determination

17. The Chair's Determination is a 115-paragraph, 23-page determination. Its structure addresses: the background; the law; the nature of the appeal on the five topics which were being raised (by Mr Hopkins for the Claimant); the response on all five topics by

the Interested Party (as respondent to the appeal, represented by Mr Oliver Williamson); the evidence; and finally, the Chair's reasoned conclusions, addressing each of the five topics. For the purposes of this claim for judicial review it is the first topic – "dismissal of the charges" – which is the material one. That topic was the appeal in respect of the Panel Determination.

18. I can clear away two points at this stage. First, the pleaded judicial review grounds expressly stated that none of the other four topics were being pursued in this claim for judicial review. In the light of that, Mr Alisdair Williamson QC accepted that he could not maintain any "fall-back point" about whether, even if Allegation 4 were not dismissed for "regulatory departure causing irredeemable prejudice such that a fair hearing cannot take place", the evidence of what the Claimant said at the Meeting should have been "excluded". That point was one of the other topics featuring in the appeal and the Chair had addressed it. It featured briefly in the Claimant's skeleton argument and had been mentioned in oral submissions by analogy with a paragraph of the Guidance (§2.178). The fall-back point having been dropped, I say no more about it. Secondly, an argument which was made in the grounds of appeal before the Chair, was based on §2.107 of the Guidance and the phrase "from the outset". The phrase "from the outset" was deployed on the Claimant's behalf as referable to a 'temporal' point about informal steps being impermissible, and the "outset" needing to be the formal process under the Regulations. Having examined §2.107 with some care at the hearing, Mr Williamson QC accepted that what that paragraph is dealing with is the identification of which regulatory regime is the applicable one to adopt, when considered alongside other procedural regimes applicable to other matters (complaints, recordable conduct matters, deaths or serious injuries). It is where there is the relevant "allegation" (Regulation 5(1)), and where other procedural regimes are inapplicable (Regulation 11), that the Regulations apply "from the outset". The Guidance is not, at §2.107, excluding any prior "process of fact finding", or actions "to ask questions", or an "initial assessment" with "fact finding". All of these are addressed, and recognised, at Guidance §§2.112 and 2.113.

19. The Chair's reasons on the topic, raised by the Claimant's grounds of appeal, that is the relevant aspect for the purposes of this claim for judicial review were set out by the Chair as follows at §102:

> ***i. Mr Hopkins submits that the misconduct regulations framework should have applied to the allegations from the outset, and the appellant should have been served with a Regulation 15 notice in advance of the meeting.***
>
> ***ii. The Panel considered this allegation that the procedures in the Regulations had been breached. It gave clear and cogent reasons for finding that Regulation 15 was not engaged prior to 12 December 2018. It explained why it found that no misconduct proceedings had been commenced, and went on to find that this was not an omission, because the issue was in the early stage of being explored, and there was still potential for an innocent explanation.***
>
> ***iii. PC Haley did not face misconduct proceedings after she was asked about the similarities in their work at a similar initial fact-finding meeting. In his submissions of 23 April 2021, Mr Hopkins says he understands that the case against her was discontinued after she had resigned from the police. However, at paragraph 42 of the grounds of appeal, he submitted that the PAT should consider parity with PC Haley, against whom no action was taken. He also referred to 15 other officers who had been referred to external examining bodies for malpractice, none of whom had been subject to a misconduct hearing.***

iv. Insofar as it is relevant, the fact that no misconduct action was taken against other officers is consistent with the evidence of Ms Stanley and DI Coward, that their initial actions were focused on the preservation of the integrity of the qualification, and their concerns would be managed as a performance issue unless "for any reason there are aggravating circumstances ie they lie to you or go out of their way to cover up their actions and there are integrity matters then it would be worth escalating to PSD." It was only after the appellant had been given the chance to respond to their concerns, at the meeting on 12 December 2018, that a decision was taken, based on his responses, to refer the matter to PSD to consider whether misconduct proceedings should be started.

v. As the Panel observed, the HOG (at para 2.113) explicitly envisages initial assessment and fact finding, provided it does not undermine the safeguards in the interests of fairness.

vi. Mr Hopkins argues that there was unfairness in proceeding with the meeting, due to lack of safeguards, as the appellant would not be facing the charges if he had been given notice of the meeting. He further argues that, at the point in the meeting when the appellant was referred to the Code of Ethics and the importance of being truthful, it should have been evident that the misconduct framework was engaged.

vii. The Panel was not persuaded that the safeguards afforded by Regulation 15 were a necessity at the 12 December 2018 meeting. It found that, at the time of the meeting, there was no expectation that the matter would amount to misconduct, it was anticipated that it would be dealt with as a performance issue, and the meeting was being conducted for the purpose of the City and Guilds process, which was not an unusual situation. In this context, I accept Mr [Oliver] Williamson's submission that no particular safeguards needed to be in place at this exploratory meeting in order to safeguard against the risk that the appellant would not tell the truth. Honesty was a fundamental requirement.

viii. Mr Hopkins says the appellant has faced prejudice, because he now faces a misconduct allegation as a consequence of what he said at the meeting on 12 December 2018. However, if he had told the truth, he would not have faced this allegation. It cannot be argued that his deliberate dishonesty was a consequence of a lack of notice, or a lack of advice, or that he was prejudiced by any other unfairness on the part of those dealing, at this preliminary stage, with the issues that arose as a consequence of the actions set out in paragraphs 1 to 3 of the allegation. On the contrary, the allegation in paragraph 4 arises solely because, despite being reminded of the requirement to be honest, he decided not to give honest answers when given the opportunity to explain how some of the work he had submitted was, to a significant extent, identical to PC Haley's work.

ix. The Police Reform Act 2002 defines "conduct matter": (2) In this Part "conduct matter" means … any matter which is not and has not been the subject of a complaint but in the case of which there is an indication (whether from the circumstances or otherwise) that a person serving with the police may have - (a) committed a criminal offence; or (b) behaved in a manner which would justify the bringing of disciplinary proceedings.

x. For the reasons set out by the panel, who properly accepted the evidence of the witnesses before it, and rejected the appellant's evidence, it was not until after the 12 December 2018 meeting that there was an indication that the appellant may have behaved in a manner which would justify bringing disciplinary proceedings. The panel found, as a matter of fact, that Regulation 15 was not engaged until after this meeting, when there was no longer a possibility of an innocent explanation.

xi. Although the allegations were drafted on the basis that plagiarism alone amounted to gross misconduct, this categorisation was not made until the possibility of alternative or innocent explanations had been discounted. The evidence before the panel was that, if an officer submitted copied work, this would not, without more, warrant the instigation of disciplinary proceedings.

xii. Mr Hopkins submits that the investigation did not accord with C&G guidance, which requires individuals accused of malpractice to be informed of the allegation in writing.

> ***However, prior to 12 December 2018, whilst his actions gave rise to a suspicion of a possible case of plagiarism, there was no accusation of malpractice; the evidence before the panel was that the appellant was invited to give an explanation, and it was only after the meeting that he was accused of malpractice.***
>
> ***xiii. I am not satisfied that the appellant has shown how it could be argued that the Panel misdirected itself in finding that Regulation 15 was not, and should not have been engaged prior to 12 December 2018.***
>
> ***xiv. Further, I am not satisfied that the appellant has shown how it could be argued that there was a procedural breach, due to the failure to recognise that Regulation 15 was, or should have been engaged prior to the meeting on 12 December 2018, and to put in place the associated regulatory safeguards for police officers who are facing disciplinary charges.***

The essence of the Claimant's challenge

20. The essence of the principal ground for judicial review, advanced by Mr Alisdair Williamson QC and Mr Hopkins on behalf of the Claimant, as I saw it, can be encapsulated as follows. Having sought to tune-in to the argument – a principal function of the Court at a hearing – some of what follows is paraphrase or embellishment.

    i) The Regulation 15 Notice is a central feature of the Regulations. It involves a deliberately-imposed duty. That duty is, moreover, expressed in terms which reflect promptness: "as soon as is reasonably practicable". Very importantly, the Regulation 15 Notice is, in several respects, a 'safeguarding' notice. It is providing protections. These include the particularity which a notice is required to provide, clarity of an early communication that the subject-matter is under investigation, transparency as to what the case is that is being alleged, as to how conduct is said to have fallen below standards of professional behaviour; key information about the procedure and possible remedies; important information about an entitlement to seek advice; and a formal caution (Regulation 15(1)(h)). The purpose of Regulation 15 is to convey safeguards. The Regulation 15 Notice is the successor of previously designed cautionary notices, including the "regulation 7 notice" – in the Police (Discipline) Regulations of 1977 – which Lord Donaldson MR (for the Court of Appeal) described in Merrill (at 1085H) as being "an essential protection for police officers". The important safeguarding protections of Regulation 15 would be undermined if informal 'fact-finding' steps are able to be undertaken, without prior notice, without particularity or procedural rights, and without the caution being given. The purpose of Regulation would be undermined.

    ii) It cannot be an answer to excuse the non-service of a Regulation 15 Notice by pointing to the absence of the prescribed preconditions which trigger its issuance (as soon as practicable) once they are met. It is true that the Regulation 15 Notice is something which is given after a person investigating has been appointed (Regulation 13(2)), which is itself a step taken only after an assessment has been undertaken, which assessment has determined that the matter is to be investigated (Regulation 12), which assessment is required to have been taken by the appropriate authority (regulation 12), to whose attention the allegation must have come (Regulation 5(1)). But it cannot be an answer for the Interested Party to say that in the present case the appropriate authority was not seized of the matter until after the Meeting, that no assessment had been conducted, that no determination had been made that a matter was to be investigated, and that

no person investigating had been appointed. The relevant (and agreed) legal principle asks whether there has been a "regulatory departure". In the present case, the "departure" has as its fruit the absence of a Regulation 15 Notice, but has as its root the failure to have taken these necessary steps. This approach to 'departure' promotes the safeguarding purpose, and avoids it defeat. Were it otherwise, the non-service of a Regulation 15 Notice could always be justified as not involving a "regulatory departure", by pointing to the (deliberate) decision not to take any one of the prior steps under the Regulations. That would subvert the protections and safeguards which Regulation 15 has the purpose and function of providing.

iii) It is right to acknowledge – as the statutory Guidance reflects at §§2.112-2.113 – that there can be particular circumstances in which limited steps involving fact-finding and the asking of questions can be taken, without triggering the procedure under the Regulations and without any Regulation 15 Notice with its safeguarding protections. However, that can only be acceptable in particular, narrow circumstances. As the first part of §2.112 of the Guidance records, a "process of fact-finding" may be conducted for the purposes of determining "which procedure should be used". That could include "fact-finding" which is relevant to the characterisation of a case, including characterisation of whether it involves a "performance" issue, and not a "conduct" issue. However, this first type of fact-finding (characterisation) is restricted to the situation where it is "not possible to make an immediate assessment". It is limited to being "only to the extent that [fact-finding] is necessary to determine which procedure should be used". As reflected in the second part of §2.112 of the Guidance (which is dealing with a different situation), there may be further circumstances in which it may be "perfectly acceptable to ask questions", relating to the facts. But that situation describes questions designed to "eliminate those police officers who are not involved" in a particular matter. There, there is a straightforward and benign question about who was present at a place or time; not what happened.

iv) The nature of the "assessment" which has to be undertaken under the Regulations, from which the Regulation 15 notice flows, is the Contingent Question. It asks whether the conduct which is the subject-matter of the allegation "would" amount to misconduct, or gross misconduct, or neither, "if proved". It is of the essence of that Contingent Question that it is not an enquiry into the facts of what did or did not happen, or the facts as to whether there is or is not a defence on the part of the officer. By contrast, it is the subsequent investigation, and not the assessment by the appropriate authority of the Contingent Question, which involves the gathering of "evidence" so as "to establish facts and circumstances" in relation to the subject-matter conduct, so as to "establish whether there is a case to answer" (Regulation 14). Still less can it be the function of an 'informal enquiry', preceding any consideration by the appropriate authority and any assessment by the appropriate authority. It is true that the decision whether to have an investigation (Regulation 12), and therefore whether to appoint an investigator (Regulation 13(2)), from which the Regulation 15 Notice would then flow (Regulation 15(1)), can be a discretionary matter where the subject-matter is assessed as potential misconduct as opposed to potential gross misconduct. But, again, all of this involved not fact-finding but a characterisation of the subject-matter by asking the Contingent Question.

v) Turning to the present case, the fact is that by at least 29 November 2018 relevant personnel within NYPS had before them a specific matter which constituted an "allegation" of plagiarism. The matter had been the subject of a "review". It had crystallised to the point of being the subject of a "Suspected Learner Malpractice Notification Form". That Form was appropriate for a case where an individual is "accused of malpractice", which language was used in the checklist for completing the Form. The matter had been discussed with a member of PSD. It was, plainly, a matter which by its nature, "if proved", "would" constitute a breach of the SPB and therefore "would" constitute misconduct. Indeed, by its nature it was a matter which "if proved" would constitute dishonesty. There was no question of 'eliminating' an officer who was 'not involved'. DI Coward's approach was a 'blanket' approach, which did not consider the specific circumstances, as he should have done. This was never a case about "theory". It was never a case about "performance". Even insofar as the 'what' could be characterisation as a "performance" matter, the 'who' as that this was for the "assessment" by the "appropriate authority", not by DI Coward. Once the nature of the content of the two student officers' uploaded work, which was materially duplicative, was identified – as it had been by Ms Stanley – this could only be a "conduct" matter. It was "possible" to make "an immediate assessment". It was not "necessary" to conduct factual enquiry "to determine which procedure should be used". The fact that there were policies and procedures relating to C&G does not alter the fact that this was in substance a matter which required – indeed cried out – for the proper and rigorous application of the Regulations including the safeguarding regulation 15 notice. This was, moreover, and very clearly, a case in which the approach to fact-finding did serve to "undermine the[] safeguards" of a Regulation 15 Notice. All of these aspects are to be found on the face of the Guidance, which has the status of statutory Guidance, to which there is a public law duty to adhere, absent an identified cogent reason for departure. It was necessary – on the part of Ms Stanley, DI Coward and PS Rawet – to recognise the clear terms of the Guidance and grapple with their proper application. There was no circumstance of urgency. There was time to reflect and design the proper, principled and safeguarded procedure and sequence of steps. For its part, the Panel did not even address the question whether the approach which was taken did "undermine the[] safeguards". And later 'safeguards', in evaluating the evidence of the Meeting having regard to the context, are no answer. Plainly, the approach did undermine the Regulation 15 safeguards.

vi) None of the themes in the evidence of the three witnesses and the analysis of that evidence by the Panel – namely the C&G policies and procedures, the "performance" characterisation, and the so-called 'prospect of an innocent explanation' – is capable of supporting the conclusion that there was no 'regulatory departure'. It is doubtful whether there could ever – in a case engaging the SPB – be a 'possible innocent explanation' justifying an informal factual enquiry. But there was not in the circumstances of the present case. Indeed, it would never be possible to eliminate one of two student officers in a case involving each uploading materially identical work as their own.

vii) The Panel's conclusions were unsound. There was a clear 'regulatory departure' from the requirements of the Regulations in not having served a Regulation 15

Notice. That clear departure arose prior to the Meeting. Alternatively, and at the very least, it arose during the Meeting when the nature and implications of the matter were clear as were the need for the Regulation 15 Notice safeguarding protections to be in place.

viii) In all these circumstances and for all these reasons: the appeal was plainly a viable one by reference to Rule 4(4)(c), being an objective criterion for the Tribunal to reapply (as well as Rule 4(4)(a): the objective reasonableness test); and the Chair's reasons (especially at §102ii, vii, xi and xii) were unsound. It was unreasonable, in public law terms, for the Chair's Determination to characterise the appeal as having no real prospect of success (Rule 11(2)(a)). Judicial review should be granted, and the matter remitted.

That, then, is the essence of the Claimant's argument. Is it right?

Discussion

21. I cannot accept this analysis. In my judgment, the Chair arrived at a conclusion which was reasonably open to her. I have reached that conclusion, in all the circumstances, having regard to the following key points in particular:

i) The principled starting point is that there is nothing on the face of the Regulations, or identifiable by reference to their purpose, which excludes as being unlawful and incompatible with the Regulations an 'informal factual enquiry' preceding a Regulation 15 Notice in an appropriate case. That is so, notwithstanding the safeguarding protections and purpose of Regulation 15. Such an enquiry does not, in and of itself, serve to undermine the safeguards of the Regulation 15 Notice mechanism.

ii) Situations which may engage a proper and acceptable informal factual enquiry can include a situation where consideration is being given to the proper "characterisation" of the subject-matter which is under consideration. A classic example will be where there is a question of whether a matter, if proved or accepted, would constitute a "performance" matter. There may be an overlap between performance and conduct. They will be situations where the view can properly be taken at an "initial assessment" that, subject to a properly pursued informal "fact finding", matters are currently characterised as "performance" rather than "conduct". These matters can engage good faith exercise of judgment. The Guidance – as statutory Guidance to which regard should be had, but which is not to be 'read as a statute' or as being 'exhaustive' – supports this in the first part of §2.112. That recognises 'informal factual enquiry' relating to a question of characterisation which can be can properly be conducted without there having been the formal invocation of the Regulations or a Regulation 15 Notice.

iii) There is also room for other examples where the question is not one of characterisation, if proved or accepted, but is straightforwardly one of fact. These matters too can engage good faith exercise of judgment. Questions can properly and acceptably be asked of officers to establish basic facts without proceeding immediately to the appropriate authority being alerted, to addressing the Contingent Question by means of a formal assessment, to appointing a

person to investigate, and to issuing a Regulation 15 Notice. An obvious example relates to facts readily capable of being elicited which would establish whether an officer could possibly have been 'involved' and therefore 'responsible'. Again, the Guidance supports this in the second part of §2.112 of the Guidance. That is a recognition of an informal factual enquiry being appropriate, where it relates to questions of fact. Moreover, a factual question about whether an officer was 'present at the time when something is said to have taken place' can readily be seen as a question which would form part of their 'defence'. It is a question which would be the subject of the gathering of evidence, to establish facts and to address whether there is a case to answer. But none of that, in principle, excludes an informal factual enquiry.

iv) Nothing on the face of the Regulations, or discernible as a matter of purpose or purposive interpretation, or in the Guidance, provides a 'hard-edged' criterion or test, as to when good faith judgments regarding informal factual enquiry can be an appropriate exercise of power without constituting a 'regulatory departure' through failure to invoke the formal steps under the Regulations, including the safeguarding Regulation 15 Notice. It is quite right that it cannot be an answer simply to say that because the preceding preconditions – the necessary formal steps under the Regulations – have not been actioned therefore there can be no 'regulatory departure' through not having proceeded to the issue of a Regulation 15 Notice. That would be a self-fulfilling prophecy which would enable the purpose and protections of Regulation 15 to be defeated and circumvented through (deliberate) inaction. The final part of §2.113 of the statutory Guidance indicates that one question which it would be relevant to pose: whether an initial informal assessment, and initial informal fact-finding, has gone "so far as to undermine [the] safeguards" of Regulation 15. That is as close to a 'test' as the Guidance comes.

v) The Panel was highly attuned to all of this, and in particular to the undermining of safeguards, in the present case. The Panel specifically set out §2.113 of the Guidance, in the heart of the Panel Determination. The Panel specifically posed the series of three Sub-Questions. Those Sub-Questions clearly focused on the substance – rather than form or label – of what was occurring. They involved expressly evaluating whether there was a 'de facto' misconduct investigation. The relevance of that is that a 'de facto' misconduct investigation, without actioning the formal steps under the Regulations, would be a situation serving to undermine the safeguards of those regulations. The Panel concluded that there was no 'de facto' misconduct investigation.

vi) Most importantly of all, the Panel specifically identified Sub-Question (3). That was the "should" question: should there have been a misconduct investigation? Here, the Panel was considering whether those who dealt with this matter "should" – ie. "ought" – in the circumstances have followed the procedure in the Regulations, including a Regulation 15 Notice. I agree with Mr Beggs QC that, read fairly and as a whole, the whole point of the Panel addressing that third question ("should") was because the Panel recognised the importance of the safeguards and the importance of those safeguards not being undermined. Unmistakeably, the safeguards of a Regulation 15 Notice would be being undermined – even if there were no 'de facto' investigation – where there

"should" have been a formal investigation (Regulation 14) rather than 'informal' "fact finding" as part of an "initial assessment" (Guidance §2.113). The Panel found that this was not a situation where there "should" have been a misconduct investigation, with the prior issuing of a Regulation 15 Notice.

vii) Whether the non-service of a Regulation 15 Notice constituted a 'regulatory departure' was a context-specific question. It engaged questions of good faith judgment. It called for an exercise of evaluative judgment by a specialist Panel. That evaluation needed to be undertaken by reference to the situation in which the relevant decision makers were acting and approaching the matter. Very importantly, the Panel heard live evidence from the three witnesses. Each of those witnesses was subject of skilful and sustained cross-examination on behalf of the Claimant. The Panel was able to put the evidence of those witnesses alongside the contemporaneous documents. The Panel was able to reach conclusions as to the clarity, straightforwardness and credibility of the position that was being expressed. The Panel was able to make clear findings of fact.

viii) What arose out of the evidence and in the Panel's reasoning in the Panel Determination, as was accurately reflected in the reasoning of the Chair at §102 of the Chair's Determination, were three key themes. The first key theme was that Ms Stanley as the person who was convening the Meeting was doing so for a purpose which related to C&G policies and procedures. Her focus, reflected by her Lead IQA role, was on the 'quality assurance' which involves ensuring that the in-house Programme delivered for student officers was being delivered and operated for NYPS in a way which matched the standards of C&G as the external accrediting and Diploma-awarding authority. The issue of plagiarism was known to be of significance for that ongoing 'quality assurance', for that policy and for those procedures. That was her genuinely-held view. The second key theme was that Ms Stanley – again as the person who convened the Meeting – was wanting to explore what had happened, in a context in which there was considered to be the potential for 'an innocent explanation'. An 'innocent explanation' could have eliminated the student officers, or one of them. That too was her genuinely-held view. It matched what DI Coward was saying to her (which was his genuinely-held view). The Panel heard the evidence of all of this and accepted it. So far as the 'potential innocent explanation' point is concerned, it is relevant that the same approach was taken in relation to both of the student officers concerned: PC Haley and the Claimant.

ix) Pausing there, it is worth stepping back. It is an obvious possibility, in a case in which two students have uploaded materially identical work, that one of the two students is the entirely innocent source, and the other student has copied the work and then submitted it as their own. It is an obvious possibility that the act of sharing work would not necessarily entail it being shared 'with a view to it being copied into an uploaded portfolio for submission'. This can be tested as a matter of common sense. Suppose, for example, that when asked one of the students had been able to say: "I wrote this; I provided it by email to my fellow student so that they could see how I had done it; but I made it very clear that it was under no circumstances to be copied and submitted as their own uploaded work; and I can show you the email I sent that says this". That sort of ready explanation was a 'potential' outcome of one of the two meetings. That student

could have been 'eliminated'. It could not have been known which of the two students would have been the 'innocent source', and which the 'copier'. This is an illustration. But what it illustrates it that it simply cannot be said that there was no 'potential innocent explanation' in this case. Of greater materiality is that two witnesses, whom the Panel heard give evidence and be cross-examined, did have the genuinely-held view that there was a potential innocent explanation. The fact that what happened subsequently was that allegations were pursued that, independently of Allegation 4, there was gross misconduct in the uploading by the Claimant of the work does not operate – by way of hindsight – to show it to have been obvious that there could be no potential innocent explanation; still less to undermine the genuinely-held views which the Panel accepted, having heard oral evidence with cross-examination.

x) That leaves the third theme which arises from the evidence, the Panel's findings and the Chair's reasons: the characterisation as a "performance" matter. When the PSD was contacted this was the characterisation which was put forward by DI Coward. As the Panel observed, it was reflected in a contemporaneous document. Again, the Panel heard evidence from that witness, who was cross-examined. Again, that was accepted as an accurate, good faith assessment on the ground, at the time, from the relevant person within PSD who was communicating with the 'quality assurance' individual who was convening the meeting for her own purposes.

xi) The Panel gave a cogent and closely-reasoned Determination – which I have already summarised – as to why, in the light of the oral and written evidence, the Guidance and the arguments that had been made it concluded that – on the particular facts of the present case – there was no 'regulatory departure'. This was not a context which "should" have attracted the formal procedure under the Regulations including a regulation 15 notice. That was a matter squarely within the realms of appraisal of facts and circumstances, as they were at the time, the evaluation of evidence including oral evidence, on matters necessarily engaging a judgment, undertaken by a specialist Panel.

xii) The Chair's Determination is itself a cogent and closely reasoned determination with key reasons – which I have already summarised – as to why this part of the appeal had no real prospect of success. Although rule 4(4)(c) would raise an objective question for the Tribunal to consider for itself, any appeal would be in the context of a process in which live evidence, cross examination and findings of fact had all been undertaken by the Panel below. An appeal would not have entailed, still less necessitated, a rerun with all the witnesses and fresh live evidence with fresh cross-examination before the Tribunal. The principled approach to findings of fact, even in the context of an appellate jurisdiction asking whether the decision below was 'wrong', was rightly referenced by Mr Beggs QC from the authorities such as Kalma v African Minerals Ltd [2020] EWCA Civ 144 at §§48-50; nor did Mr Williamson QC submit otherwise. The Chair's key reasons clearly identified the same three key themes to which I have referred. There is nothing in the way of legally inadequate reasoning, or illogicality or unreasonableness. The only point which I was able to identify as having any potential traction was that the Chair at §102xii (which I have quoted earlier) spoke of their being "no accusation of malpractice" until after the

Meeting, whereas the Suspected Malpractice Form checklist used the language of a person "accused of malpractice". The answer is that that checklist was a prompt relating to informing the individual in writing of an allegation, if "accused of malpractice", which step was not taken. The Panel heard evidence on this topic, whose relevance said to be evidential support for the position under the Regulations. The Panel accepted that the Claimant was being invited to give an explanation, which is the point made by the Chair at §102xii. In any event, it is impossible to accept that anything in that paragraph could stand as a vitiating flaw so far as concerns the reasonableness of the Chair's Determination, when the reasons are read fairly and as a whole.

Other points

22. That leaves the two further grounds for judicial review and a delay point, each of which form part of a skeleton argument that was adopted by its proponent, and none of which were the subject of any developed oral argument. I can take these points briefly.

    i) A further ground for judicial review was an argument developed briefly in the pleaded judicial review grounds and the Claimant's skeleton argument, but not developed orally, that the Chair misdirected herself as a matter of law as to the Rule 11(2)(a) test: "the appeal has no real prospect of success". The argument is that the Chair went wrong in law in saying that "the appeal must be more than arguable. In deciding whether the appellant has a real prospect of success, he must have a 'realistic' rather than 'fanciful' prospect of success". The argument rests on the negative language in Rule 11(2)(a) ("no real prospect of success"), the positive language used by the Chair ("whether the appellant has a real prospect of success"), and the discussion by Moore-Bick J in International Finance Corp v Utexafrica Sprl [2001] CLC 1361 at §8, distinguishing a "no realistic prospect of success" formulation with the "real prospect of success" formula for setting aside a default judgment, a test involving "a realistic prospect of success" carrying "a degree of conviction". On careful examination, the point that Moore Bick J was making was that the established "degree of conviction" threshold, in the application of the default judgment "real prospect of success" test, was different from the "ordinary language" of "no realistic prospect of success" which would exclude only a "hopeless' case and would allow a case which was "merely arguable". Moore-Bick J was not saying that there is some magic in whether the test is formulated or applied using the positive or negative formulation. In the present case, there either was or was not a real prospect of success. In the present context, the Chair unassailably recognised that a "real prospect" would need to be "realistic" and not "fanciful", a truth equally applicable whether asking whether there was – or whether there was not – such a "real prospect". This ground, while impressive in its industry and ingenuity, is ultimately invisible.

    ii) A third ground for judicial review briefly developed in the pleaded grounds and skeleton and adopted, but not developed further, in oral submissions is that the Chair made an unreasonable or legally inadequately reasoned decision on the alternative limb of Rule 11(2)(b) ("other compelling reason why the appeal should proceed"). The answer to that is that the chair specifically addressed this second limb and rejected it, being unpersuaded by the submissions that had been put forward as to the importance of the Regulation 15 issue, independently of

its viability in terms of a real prospect of success; and the Chair was plainly entitled acting reasonably in a public law sense to conclude that, given that the 'regulatory departure' involved an unassailable fact-specific evaluation of the circumstances of the case on the oral and documentary evidence, there was no remaining "compelling reason" for an appeal having no real prospect of success being allowed to proceed.

iii) The delay point was one taken briefly in the Interested Party's detailed grounds of resistance and skeleton argument, which Mr Beggs QC adopted. The point made is that judicial review was commenced 12 weeks and one day after the impugned decision, which constitutes a lack of promptness for which no justification had been given. This is a case in which permission for judicial review has been granted, in terms which did not leave the promptness question as being at large. It is not in my judgment open to the interested party to maintain the promptness objection in the circumstances of this case but, even if it were, I would not have dismissed on grounds of delay or lack of promptness a claim of this nature commenced well within the three months, where there is no identifiable hardship, prejudice or detriment to good administration on the part of anyone. The delay point was a bad one.

Order and consequentials

23. Circulating this judgment as a confidential draft enables me to deal here with the question of the Court's order and any consequential matters arising. The appropriate order was agreed and is straightforward. I ordered that: (1) The Claimant's Claim for Judicial Review is dismissed. (2) The Claimant do pay the Interested Party's costs, to be subject to detailed assessment if not agreed.